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MEMORANDUM

DATE: December 7, 2006

TO: Chief Circuit Court Judges
Family Division Judges
Circuit Court Administrators
Family Court Administrators
IV-E Coordinators

FROM: Dan Wright

RE: Title IV-E Secondary Review [Federal Funding for Foster Children]
Response required by December 14, 2006

The federal government will conduct a secondary Title IV-E Eligibility Review in Michigan from March 26 to March 30, 2007. The federal reviewers will examine 150 IV-E cases selected randomly from among Michigan's IV-E cases that were active for part or all of the six months between April 1, 2006, and September 30, 2006, the "period under review" (PUR).

Juvenile courts must be prepared to do two things to prepare for the secondary review. First, each court should cooperate with the Michigan Department of Human Services (DHS) to identify and remove before **January 1, 2007** any IV-E cases that were active during the PUR that have court orders that do not comply with federal requirements. Second, each court should ensure that it is ready to quickly provide case files and other information to DHS. DHS will be assisting the federal reviewers by collecting the audited cases' IV-E documentation supporting the IV-E eligibility. Each court must be prepared to respond quickly to DHS requests for information, particularly requests for expedited transcripts that may show the basis for the court order's findings.

Please provide the following information by Thursday, **December 14** so that SCAO/FSD can assist DHS to carry out the items listed above in preparation for the audit:

1. Whether, for any IV-E foster care case that was active between April 1, 2006, and September 30, 2006, there was ANY period during that case's entire history (including

periods before the six-month PUR) during which the court did NOT use the SCAO-approved court forms.

2. Advise SCAO/FSD of any case for which there may be a question whether the order entered by the court satisfies the federal regulation requirements summarized in this memo.

3. Submit your court's plan for obtaining transcripts on an expedited basis.

I am aware that many jurisdictions have been working with local DHS offices over the past year to review cases before the next audit. However, if your court has not yet done so, it is not too late. Any effort that you expend now will go a long way toward heading off a subsequent Michigan failure. Since it is likely that any financial penalty the federal government imposes will be shared to some degree by all counties, it makes sense for all counties to do whatever they can to show that federal funding for every IV-E case is appropriate and well-documented.

Please send your responses to Steve Capps by e-mail cappss@courts.mi.gov. After you have submitted your information, SCAO and DHS will work with you to prepare for the upcoming review. If you have any questions please contact Steve Capps at 517-373-9318 or by email at cappss@courts.mi.gov

AUDIT OVERVIEW

Michigan's Title IV-E Foster Care **Primary** (i.e., first stage) Eligibility Review was conducted March 22 through 26, 2004, by the U.S. Department of Health and Human Services' Administration of Children and Families (HHS), in collaboration with the Michigan Department of Human Services (DHS). During that review, federal auditors reviewed DHS case files (not court files) to determine whether federal IV-E payments were made pursuant to federal statutes and regulations. The primary review looked at cases that were open during the period of April 1 to September 30, 2003. The secondary review will sample cases that were open from April 1 to September 30, 2006.

During the primary review, HHS reviewed 80 DHS case files. Under federal audit regulations, to pass the primary review, those 80 cases could not contain more than 8 cases with errors. Unfortunately, HHS found 12 cases that did not comply with federal standards. Eight of the twelve cases were appealed to the HHS Departmental Appeal Board. One case was settled and one finding was overturned by the Board. But, Michigan was still out of compliance in ten of the cases. Although those cases are being further appealed to federal court, the March 2007 secondary review must proceed as scheduled.

If the HHS reviewers find that a case was not eligible for Title IV-E funding, HHS takes back from the state of Michigan the approximately 50 percent of that case's funding that was paid by federal government transfers to the local government's Child Care Fund (approximately $280,000 for the cases in the 2004 audit). Michigan's share of the cost (the other 50 percent funding for each case) is the same whether cases are eligible or ineligible for Title IV-E funding.

The upcoming **secondary** review will examine 150 DHS cases that received Title IV-E funding from April 1 to September 30, 2006, regardless of when the child was removed from the home. That means that the reviewers may audit a case that was opened in 2000 and was still open during 2006. If the auditors determine that more than 15 of the 150 cases are noncompliant, two penalties will be assessed. The first is case-specific and is calculated as during a **primary** review. But, if a state fails its **secondary** review, then the federal government imposes a greater penalty that is calculated by extrapolating the rate of error found during the review to the entire population of Michigan cases that received Title IV-E funding. Using the 2004 numbers as an example, with a 15 percent error rate, Michigan would have to repay approximately $37.2 million. Obviously, this extrapolated penalty is much greater than the amounts reclaimed in just the cases actually audited and found to have errors.

DHS has repaid the amount owed from the 2004 primary review. However, if HHS imposes penalties against Michigan following the secondary review, DHS likely will not pay those. It is possible, and perhaps likely, that each county's Child Care Fund will be responsible for its share of the actual and extrapolated penalties.

FEDERAL REQUIREMENTS FOR COURT ORDERS IN IV-E CASES

The federal government interprets Title IV-E regulations strictly. Those regulations are found in 45 CFR Parts 1355, 1356 (particularly 1356.21 and 1356.71), and 1357. When these regulations require a "judicial determination," it must be stated clearly in a written order or the hearing transcript. **Making reference to other documents is not sufficient.** Nor will the auditors be expected to understand from the "context" of a statement or event during a hearing what the court actually did or meant. For example, in Michigan's primary review, a case was found to be noncompliant because a court failed to check a box on a standardized form - even though it was clear from the overall context what finding the court had made.

Federal regulations require courts to take an active role to guarantee: (1) that children are not unnecessarily removed from their homes; (2) that efforts are made to reunify them with their families; and (3) that permanent homes are found as soon as possible. To further those purposes, courts are charged with making certain "judicial determinations" and stating them in written orders. [Auditors are permitted to look for these judicial determinations in a transcript, but the findings are supposed to appear in a written order.]

- Specifically, for a child in foster care to receive Title IV-E funding, the court must have found in a written order [or a transcribed statement]: (1) that it was contrary to the welfare of the child to remain in the home; (2) that reasonable efforts were made to prevent the child's removal from the home; and (3) that reasonable efforts to finalize the child's permanency plan are being made. All required findings must be case-specific.

Contrary to the Welfare A judicial determination that it is contrary to the welfare of the child to remain in the home must be made in the **first** court order for the child's removal. The case will never be eligible for Title IV-E funds if the first order does not include that finding. 45 CFR 1356.21(c)

- The order must state why remaining in the home was contrary to the child's welfare. Ideally, the order should say: "It was contrary to the welfare of the child to remain in the home BECAUSE…"

- HHS prefers that the order or transcript state the reasons for the judicial finding. But, cases already in the system will not be disallowed if, e.g., the order includes the bare finding and references a document that details the reasons for removal. We recommend that courts not merely reference "petition" or "JC04b."

DHS Care and Supervision To receive Title IV-E funding, the case's first order, and all subsequent orders, must state explicitly that the child is "placed with DHS for care and supervision" (or use very similar words).

- "Foster care" includes "placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and pre-adoptive homes." 45 CFR 1355.20.

- With very rare exceptions, the **court** should not order a **specific** foster care placement; that is a **DHS** responsibility.

- When a court orders a specific foster care placement, Michigan and the county cannot receive federal matching funds for the child UNLESS the parties are given the opportunity to present evidence and arguments concerning the court-ordered placement and the court works with parties, including DHS, to make an appropriate placement. 45 CFR 1356.21 (g). However, this is a **huge** red flag with both HHS and DHS; therefore, we suggest that a placement be recommended rather than ordered. HHS expects to see orders that "place the child with DHS for care and supervision."

Judicial determinations of reasonable efforts to prevent removal Within 60 days after a child is removed from the home, the court must issue an order that includes the court's finding that "reasonable efforts to prevent that removal were made" or that, because an exception like "abandonment" applies, reasonable efforts to prevent the removal were not required. 45 CFR 1356.21(b)(1)(i). The removal date is the operational date for calculating the deadlines for making the "reasonable efforts" findings.

- Courts should try to make the "reasonable efforts to prevent removal" finding in the initial order removing the child, at the preliminary hearing, or, at the latest, at the pretrial hearing. Failing to make that finding in a written order entered within 60 days of removal will cause a retroactive and permanent disallowance of Title IV-E funding for the child's entire out-of-home placement episode. The finding must be clear and specific. Cases have been determined to be deficient because the boxes checked on the order were inconsistent with language contained in the order.

- HHS has recently interpreted Title IV-E as requiring that the "contrary to the welfare" and "reasonable efforts to prevent removal" findings must **both** have been made before a child can be eligible to receive Title IV-E funds. It is sufficient if both findings are made within the same calendar month. Michigan has previously assumed that once the "contrary to welfare" finding is made, the child is immediately eligible for funding, provided that the "reasonable efforts to prevent removal" finding is made within 60 days of removal. HHS's current interpretation means that there could be a gap in funding if the second finding is delayed beyond the end of the first month.

The judicial finding of reasonable efforts to prevent removal from the home [or to reunify the child and family] must be made in all cases unless the court finds that:

(1) The parent has subjected the child to "aggravated circumstances" as defined in state law. (MCL 722.638)
(2) The parent has been **convicted** of: murder of another child of the parent; voluntary

manslaughter of another child of the parent; aiding or abetting, attempting, conspiring, or soliciting murder or voluntary manslaughter; or a felony assault that results in serious bodily injury to the child or another child of the parent.
(3) The parent has had parental rights to a sibling involuntarily terminated. 45 CFR 1356.21(b)(3)(i)(ii)(iii).

PERMANENCY PLANNING HEARING

Judicial determinations of reasonable efforts to finalize a permanency plan

The first permanency planning hearing must be held no later than 12 months after the child is considered to have entered foster care, or within 30 days of a judicial determination that reasonable efforts to reunite the child and family are not required. 45 CFR 1355.20. Failing to hold the hearing within that time period will result in discontinued funding. However, funding will be reinstated once the hearing has been held.

Within 12 months of the date the child is considered to have entered foster care, and at least every 12 months thereafter, the court must make a written finding that reasonable efforts to finalize the permanency plan have been made during the preceding 12 months, and are continuing. 45 CFR 1356.21(b)(2)(i).

Although "entered foster care" means the earlier of: (1) the date of the first judicial finding that the child has been subjected to child abuse or neglect, or (2) the date that is 60 calendar days after the date on which the child is removed from home [45 CFR 1355.20], MCR 3.976 uses the date of removal from the home as the trigger date for holding permanency planning hearings.

The court must hold a permanency planning hearing at least every 12 months for as long as a child remains in foster care. This hearing is required even if parental rights are terminated. A permanency planning hearing may be conducted simultaneously with a post-termination review (PTR). When required, a PTR must also address reasonable efforts to finalize the permanency plan. To make sure that permanency planning is addressed after termination, every PTR hearing should be conducted as a PPH hearing.

Title IV-E funding eligibility will cease on the last day of the month in which a judicial determination regarding finalizing a permanency plan should have been made. Funding will resume only when the next judicial determination on permanency planning is made. HHS has interpreted this to mean that funding resumes as of the first day of the month in which the permanency planning hearing is held. 45 CFR 1356.21(b)(2)(ii)

Permanency planning hearing requirements

The child's parents, the child (if age appropriate), foster parents, and pre-adoptive parents (if applicable) must be allowed to participate in the permanency hearing. 45 CFR 1355.20(a). The statute is silent as to relative caretakers, but that appears to be an inadvertent omission because,

per 45 CFR 1356.21(o), relative caretakers must be provided notice and an opportunity to be heard at permanency hearings.

The court must make a finding whether reasonable efforts to finalize the permanency plan were made.

Under 45 CFR 1356.21(b)(2)(i), there are five permanency options:

(1) Reunification.

(2) Adoption.

(3) Legal guardianship.

(4) Placement with a fit and willing relative.

(5) Placement in another planned permanent living arrangement.

The fifth option, "placement in another planned permanent living arrangement," which may include placement under a permanent foster family agreement (PFFA), can only be considered after the other options are ruled out and DHS has documented compelling reasons for the alternate plan. 45 CFR 1356.21(h)(3).

If DHS recommends an order including a PFFA, the DHS report must contain thorough documentation in support of the compelling reasons for adopting a PFFA. Such documentation will allow the court to adopt the recommendation and state the basis for it in an order.

Independent living (IL) does not qualify as a permanent plan under Title IV-E.

OTHER REQUIREMENTS

In all open foster care cases, periodic reviews must occur within six months after the child is considered to have entered foster care ("removal" for our purposes) and at least once every six months thereafter.

If a child has been in foster care for 15 of last 22 months, a petition to terminate parental rights must be filed by the end of the child's fifteenth month in foster care, unless special circumstances make a petition to terminate inappropriate. 45 CFR 1356.21(h)(4)(ii); 1356.21(h)(4)(ii)(D)(ii).